gun or guns or any other weapon or burglar's tools. He just could hardly believe a robbery had been committed after he had been arrested.

Mr. Reibman: May I interrupt for one moment, Counsel, please. And I am not commenting on the evidence. I think the record should reflect that a plea was entered—let me finish, please. I think the record is not setting forth what the Judge should hear on this type of case. A plea of guilty was entered and a plea that, as I understand it, admits the facts contained in the indictment. Now counsel has indicated to the Court that the plea of guilty was not a true plea of guilty, because the facts, as counsel sets forth to your Honor now, indicate there was no intent shown by this boy, that he did not participate in any way in the wrongdoing.

If that is the case, then, Judge, we ask that your Honor set aside the plea of guilty entered and set the matter down for trial and let's have a trial.

The Court: Edward Kwiek?

The Defendant Kwiek: Yes, sir.

Q. Do you admit that you participated in this robbery as charged in the indictment?

A. I just told them I worked for the company.

Q. I am not interested in what you told them. Do you admit, as you have by your plea—

A. Yes, sir.

Q. —that you participated in this robbery, as alleged in the indictment?

A. Yes, sir.

Q. You admit that?

A. Yes, sir.

Q. You admit your guilt?

A. Yes, sir.

Q. As the plea reflects?

A. Yes, sir.

The Court: I want to make that clear. If there is any doubt, I am going to set aside—

Mr. Schultze: I wouldn't say he is innocent at all, Judge. If he were innocent, I would have him plead not guilty.

The Court: The Court doesn't want the slightest doubt in my mind that the defendant does not understand the nature of a plea of guilty or feels he is being tried for something he didn't do. If that is the case, he should plead not guilty and be tried. Do I understand correctly, by your plea of guilty you are admitting you participated in this robbery as charged in the indictment, is that right?

The Defendant Kwiek: Yes, sir.

The Court: Does the State wish to proceed?

Mr. Reibman: Yes, Judge. I just wanted the record to reflect.

The Court: I am giving you an opportunity for any evidence in mitigation, not to the guilty or not guilty, as indicated. With respect to the man, he had a marvelous war record, no previous criminal record. Anything in addition to that?

Mr. Schultze: Nothing further, excepting what I have already said. He pleaded, admits his guilt. We say he is guilty. We are not arguing.

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32 Mr. Reibman: I will direct my remarks to Mr. Kwiek. I think his is the greater dilemma your Honor has before you. He is a man, thirty-seven, and old enough to know better. Notwithstanding he has pleaded guilty, Mr. Robinson, who is the aggravated party and the victim robbed, advises us that the defendant, Kwiek,

did work for him for a great many years, has a feeling of sympathy. He has returned kindness with a terrible wrong by instigating this type of a robbery. He has no record. He has a good war record.

Our position in all armed robberies, this and all your Honor will hear, will be that the State would have to oppose probation in armed robbery cases, Judge. We have no compunctions as opposing it regarding the other two, based on the records. He is the older man of the three before you, Judge. The policy of our office is to oppose probation, and that is what we are doing.

The Court: The Court has before it this situation. We have a man, Edward Kwiek, who is thirty-seven years of age, who has worked for the complaining witness for over twelve years at a very good salary. He has a very fine war record. He has no previous criminal record.

• • •

The defendant, Kwiek, because of his age, should have known better here. You should have given these boys the guidance that your age and maturity would require. In addition to that, you broke the confidence and trust, in fact, bit the hand that was feeding you. I don't think these boys would have done this unless you had talked to them or given them the idea, and it was done.

• • •

The Court: Probation denied. Now does the State have a recommendation as to a sentence?

Mr. Reibman: As to the defendant, Secor, who actually participated in the robbery directly and used a gun, our recommendation will be a minimum of one, maximum of five.

As to the other two defendants, we would recommend a minimum of one, maximum of three, inasmuch as they didn't use the guns, didn't actually go into the place of business.

Mr. Schultze: Your Honor, I think that is too serious, too, the punishment is very severe for two people here who didn't get anywhere near the place, did not furnish any guns, never believed anything would be done. They pleaded guilty. They had talked about it, but never did they expect anything would be consummated.

The Court: Now, counsel, I want to warn you again. I have done it twice. If you are going to give any arguments to the Court on a plea of guilty, I am going to withdraw the plea and let them plead not guilty. We have been all through this. Not only has he pleaded guilty, I explained the consequences to them, and again went over it this morning to make sure they understood. By their plea they have admitted all that. I have denied the applications for probation and we are now directing our attention to the recommended State sentences. Keep in mind this Court can sentence them from one to life in the penitentiary for this offense.

Mr. Schultze: Your Honor, if the State and you look that way upon it, I am duty bound, as the counsel, to have him withdraw his plea of guilty. I think this is on the border line of too great a severity being imposed upon a couple of fellows. This older man, a family man, just dumb, that is all, just a foolish man. I think I would like to have him retried on a plea of not guilty. I didn't think it would go this far, that these two young men, particularly Kwiek, should go to the penitentiary, never having carried a gun or done anything in this matter to perfect a robbery.

The Court: Counsel, you know—

Mr. Schultze: He is clean as a whistle, Judge, no record. He still should go to the penitentiary? Never touched a gun; and the brains have been sentenced sometime ago. They are the ones that came and approached Kwiek and Allivato. They didn't go and approach them, "We got a plan here, a chance to make some easy money."

The Court: Kwiek worked for the complaining witness twelve years. If he hadn't given them the idea or talked to them, this thing may not have happened. Even though he may not have used a gun, he was part and parcel of what happened there. You know by this plea of guilty as accessory before and after the fact, it makes no difference.

Mr. Schultze: I know you judges convict gun carriers.

The Court: This whole thing wouldn't have happened, whatever part he may have played.

Mr. Schultze: He is just a numbskull. You can see he is not highly intelligent. I think his intelligence should be tested by a psychiatrist or doctor of some sort. You can see he is not overly bright. And he should go to the penitentiary?

The Court: It is just fortunate somebody was not killed.

Mr. Schultze: But he never believed that a robbery or such a thing would be committed. He just foolishly spoke out of turn.

The Court: Counsel, you make one more statement like that, I will withdraw the plea and let him plead not guilty.

Mr. Schultze: Very well.

The Court: I am asking you now to direct your remarks to me on the recommendation of the State.

The Court: How does the complaining witness feel about the State's recommendation?

Mr. Robinson: I prefer the State's recommendation.

The Court: Counsel, both of you, I have considered this case very, very carefully, and believe me, if I could help these young people because of their age, I would do it, but I can't, in good conscience, in the face of this record, comply with your request.

Secor in 1954 was chased by the police and shots were exchanged; a little later on, 1955, there also with a gun. These are serious things. On the face of this record, I can't possibly. And also the State's recommendation is reasonable under the circumstances, yet in this case, because of the ages, I think the Court is going to reduce that to one to three.

That will be the sentence of the Court. Each of them will be sentenced to the penitentiary for a minimum of one year, maximum three years.

Mr. Reibman: Judge, you are the best—If you think that is reasonable, you know all the facts. Certainly we acquiesce in whatever you do.

Mr. Schultze: Your Honor, I again make a motion as to his plea here being withdrawn. I don't think he is being—I think he is being, getting too much of a sentence here for what he did. Your Honor, he just told me there was Union trouble and this fellow Robinson, has been having it in for him the last two or three years.

The Court: Counsel.

Mr. Schultze: Really.

The Court: This case has been up before. You can't stand before this bar and one breath plead guilty, ask the Court and don't get what you want, and the next breath withdraw the plea.

Mr. Schultze: You asked me if I wanted to do it. I am doing it now.

The Court: Motion denied.

Mr. Schultze: I make a motion for a new trial as to Kwiek and—

The Court: On a plea? There has been no—

Mr. Schultze: Well, you said I could withdraw the plea. Motion in arrest of judgment.

The Court: That is denied.

The Defendant Kwiek: Your Honor, my wife is going to drop dead on this. I am going to lose everything I have.

The Court: You should have thought of that before you did what you did. These kids wouldn't have been here, maybe. It is high time we stopped coddling people like you. Robbery with a gun is a very serious offense. Somebody could have been killed here.

The Defendant Kwiek: I had nothing to do with it.

The Court: One to three.

Mr. Schultze: I make a motion for an appeal, your Honor."

After his application for probation was denied and he was sentenced to the penitentiary, the defendant retained as his counsel the attorneys who represent him in this Court. Through these attorneys defendant moved to vacate the sentence theretofore imposed upon him and for leave to withdraw his plea of guilty and to enter a plea of not guilty. This petition alleged as follows: (Abst. 6)

"1. That he is one of the defendants in the above entitled cause.

2. That on the 12th day of August, 1958, he entered a plea of guilty to the indictment herein, and judgment of guilty was entered on said plea.

3. That on the 17th day of September, 1958, this Court sentenced your petitioner to the Illinois State Penitentiary for a term of years not less than one nor more than three.

4. That the attorney whom your petitioner had retained to represent him in the above indictment represented to your petitioner that your petitioner would be placed on probation by this Court and would not be sentenced to the penitentiary if he entered a plea of guilty.

5. That based upon this said representation, your petitioner entered his plea of guilty.

6. That your petitioner is informed that the Assistant State's Attorney who prosecuted this cause stated to the aforementioned attorney for your petitioner that your petitioner would be granted probation if your petitioner would enter a plea of guilty; and that said attorney relied upon this representation of the Assistant State's Attorney at the time that said attorney advised your petitioner to plead guilty.

7. That your petitioner is not guilty of the above indictment."

A. Jefferson Schultze, counsel for the defendant, testified (Ab. 23-25) that on or about August 12, 1958, he had had a conversation with Mr. Reibman the Assistant State's Attorney in charge of the prosecution of the case, concerning probation for the defendant. Schultze testified that he had said to Reibman that he, Schultze, felt that the defendant should receive probation; however, Reibman, according to Schultze, stated, "Oh, no, he will have to do some time in the County Jail." Schultze testified that he had thereafter told the defendant, "I suggest that you enter a plea of guilty because you would get proba-

tion." To this the defendant replied, "That is what I thought I would get if I pleaded guilty, although I am not guilty. I plead guilty. I had a little to do with it, but if you think that is the best, well, alright." Schultze stated that the Court had never made any representation that the defendant would receive probation.

Edward Kwiek, the defendant also testified (Ab. 26-28) at the hearing on the motion to vacate sentence. Because his testimony would lose much if stated indirectly, we here set forth his testimony on direct examination:

> "My name is Ed Kwiek. I am the defendant in this case. Prior to the time that I pleaded guilty in this case I talked to Mr. Schultze. He told me to plead guilty. He told me that if I pleaded guilty I would get probation. It was based on that statement that he gave me that I would get probation that I entered the plea of guilty. I am not guilty of the crime. On the day that I was sentenced I did not talk to Mr. Schultze. I went to work and was promised probation. The day we were in Court it was a Jewish holiday and we set it off for the 17th of September and I met Schultze across the street on 25th Street while I was waiting for a Stop light in a truck and I asked Schultze, should it be for me to come down prepared for sentence or to get the probation; and he told me, no, if you can get away you can come down with the truck, as I didn't take the day off to come down for probation. I came down with the truck. It was the truck that I was using in my employment. I was working for Arthur Johnson. I didn't expect to be put in jail and left the truck outside. Mr. Schultze said that I would get probation and would be able to go back to work, so I came down with the truck. I didn't get what I expected, probation. Mr. Schultze

didn't tell me how to expect the probation. All he told me that 'you will get probation.' "

In answer to the testimony of the defendant and his former counsel, the State called Reibman, the Assistant State's Attorney, as a witness to testify as to any conversations which he had had with Schultze concerning probation. (Ab. 28-30) Reibman stated that he had never made any representation to Schultze that the defendant would receive probation or probation conditioned upon a sentence to the County Jail.

At the end of the hearing on the motion to vacate the sentence, the court denied the motion.

Reasons for Granting Writ

The trial court was put on notice during the hearing on the application for probation that this was not the ordinary case of a defendant entering a plea of guilty. The following statements brought to the attention of the court the fact that there was a serious question of the defendant's guilt:

> Mr. Schultze: They were never anywhere near the scene of the robbery, they didn't know any robbery was going to be committed, they didn't believe there was going to be one committed, they furnished no guns or anything, or any outline of a plan. (Abst. 14)
>
> • • •
>
> And Edward Kwiek explained to me that he never had any idea that any robbery would be committed. He had given them some information carelessly in a tavern, and that was his sin, if he just talked a little too much. He was never anywhere near the scene of the crime. He didn't give them any plans, any written or geographical plans, did not go with them, did not show them anything, did not furnish them with any

gun or guns or any other weapon or burglar's tools. He just could hardly believe a robbery had been committed after he had been arrested. (Abst. 16)

Counsel for the prosecution became aware of the highly irregular nature of the plea of guilty and said:

> * * * Now counsel has indicated to the Court that the plea of guilty was not a true plea of guilty, because the facts, as counsel sets forth to your Honor now, indicate there was no intent shown by this boy, that he did not participate in any way in the wrong doing.
>
> If that is the case, then, Judge, we ask that your Honor set aside the plea of guilty entered and set the matter down for trial and let's have a trial. (Abst. 16)

The court then proceeded to question the defendant as follows:

> The Court: Edward Kwiek?
>
> The Defendant Kwiek: Yes, yes.
>
> Q. Do you admit that you participated in this robbery as charged in the indictment?
>
> A. I just told them I worked for the company.
>
> Q. I am not interested in what you told them. Do you admit, as you have by your plea—
>
> A. Yes, sir.
>
> Q. —that you participated in this robbery, as alleged in the indictment?
>
> A. Yes, sir.
>
> Q. You admit that?
>
> A. Yes, sir.
>
> Q. You admit your guilt?
>
> A. Yes, sir.
>
> Q. As the plea reflects?
>
> A. Yes, sir. (Abst. 16-17)

The statement by the defendant that he "just told them he worked for the company" clearly indicated that he wished in some way to express his innocence. The trial court, however, expressed disinterest in the defendant's

explanation by saying that he was not interested in what the defendant had told the co-defendants. However, what the defendant told his co-defendants was highly material to the question of the defendant's innocence. The court then questioned the defendant as to whether he "admitted" his guilt and participation in the robbery. It is our contention that these questions were not conducive to the defendant's changing his plea at that time, especially since he had been assured by his counsel that as long as he persisted in the plea of guilty he would receive probation, and since the court had already indicated a disregard for the defendant's defense to the charge.

No answer can be given why defendant's then counsel persisted in the course of action outlined above. The State has insisted that the defendant was vigorously defended because of the repeated objections and statements voiced by his then counsel, but the record shows that the only statements contributed by him were the repeated protestations of the defendant's innocence and the just as repeated insistence upon a plea of guilty. The trial court remarked that the defendant could seek recourse against his prior counsel. (See Appendix II page 24, *infra*) This remark could have only meant that the court, too, felt that the defendant's representation had not met the standards of quality and integrity required by the Bar. To ascribe a flippant meaning to this statement of the court, is to ignore the record as a whole and to disregard the solemnity which judicial pronouncements must be given. It is obvious that in view of the record the court felt that justice had not been served in the conduct of this case. In the interests of justice, then, and certainly in a case where the defendant had made statements which should have alerted the trial court as to the inaccuracy of a plea of guilty, the court should have vacated the judgment and allowed the defendant to withdraw his plea of guilty.

Throughout this case, the State has attempted to exculpate itself of any wrongdoing on the basis that it was Schultze and not the State which made the false representation. The State cannot rely upon the misdeeds of another for justification of its attempt to imprison a man who maintains his innocence. Reliance by the State on a low quality of representation by counsel for an accused in order to obtain a conviction is equivalent to relying on perjured testimony, see *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959), and constitutes a denial of due process of law.

We are not unmindful that several times during the hearing on the application for probation, the trial judge stopped the proceedings in order to ascertain whether or not the defendant wished to persist in his plea of guilty. Such action on the part of the trial judge, when he perceives that there might be some question as to the guilt of a defendant who pleads guilty, is commendable. However, when it was shown, at the hearing on the motion to vacate sentence, that the admonitions of the trial judge had had no effect upon the defendant, the judge should have vacated the sentence and permitted the defendant to plead not guilty. The court's admonitions lost their effect because of the conduct of the counsel who had represented the defendant at the time that he was sentenced. Counsel had assured the defendant that probation would be granted upon the entry of a plea of guilty. This was a misrepresentation. There was no basis in fact for this misrepresentation, and, by making the misrepresentation, counsel failed to adequately represent his client's interests in the case. The quality of the legal representation afforded to the defendant, by his former counsel was of such a nature as to amount to a denial of counsel.

In *Lunce* v. *Overlade*, 7 Cir., 1957, 244 F. 2d 108 the United States Court of Appeals for the Seventh Circuit reversed and remanded for a hearing a case in which the petitioners in a federal court sought relief from a judgment in a state court by way of *habeas corpus*. The petitioners claimed a denial of due process through the inadequacy of their representation by counsel. The District Court disposed of this claim on the basis that the petitioners were represented by counsel of their own choice. In Reversing this ruling the Court of Appeals said:

"* * * As a rule, an accused cannot proceed to trial with counsel of his own choice and later claim a denial of due process chargeable to the state because of errors committed by such counsel. See *United States ex rel. Darcy* v. *Handy*, 3 Cir., 203 F. 2d 407, certiorari denied *sub nom. Maroney* v. *United States ex rel. Darcy*, 346 U. S. 865, 74 S. Ct. 103, 98 L. Ed. 375, and cases cited therein. However, where the representation of an accused by his counsel is so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham, it is the duty of the state to see that the essential rights of the accused are preserved by appropriate intervention. *United States ex rel. Darcy* v. *Handy*, *supra*; *United States ex rel. Feeley* v. *Ragen*, 7 Cir., 166 F. 2d 976. In the instant case the incompetence of the defense was so apparent as to call for intervention by the officers of the state but nothing was done. * * * [O]our concern here is the state's deprivation of petitioners' rights under the Fourteenth Amendment by denying them that fundamental fairness without which no conviction can stand."

The representation received by the defendant in the case before the Court consisted of: The advice to plead guilty; and the representation that, upon pleading guilty, the defendant would assuredly receive probation. In view of the facts that the then counsel for the defendant knew that

the State's Attorney as a matter of policy opposed probation in armed robbery cases, that the Assistant State's Attorney in charge of the prosecution had informed the attorney that the defendant would have to be imprisoned, and that the trial judge had made no commitment as to sentence, the representation afforded the defendant amounted to no representation and the trial of the defendant was indeed a sham and a farce.

The Supreme Court of Illinois has not cited one case in support of its decision and its opinion does in fact go against all prior decisions of that court. The interests of justice cannot be subserved by the refusal of the trial court or of the Supreme Court of Illinois to grant to the defendant his day in court. Those Courts have said in effect that the people of the State of Illinois are too busy to determine the guilt or innocence of the defendant.

From the above and foregoing it can only be concluded that the defendant was not afforded justice, and in the interest of justice the writ should be granted.

CONCLUSION.

For the above and foregoing reasons it is prayed that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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On the Brief

APPENDIX I.

Opinion of The Supreme Court of Illinois

The People of the State of Illinois, Defendant in Error, v. Edward Kwiek, Plaintiff in Error.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

Edward Kwiek pleaded guilty to a charge of armed robbery. His application for probation was denied and he was sentenced to the penitentiary for a term of not less than one nor more than three years. Thereafter he secured new counsel, who moved to vacate the judgment and sentence, and for leave to withdraw the plea of guilty. These motions were denied, and on this writ of error defendant contends that the trial court abused its discretion in denying them.

We do not agree. Five persons were indicted for the robbery. On August 12, 1958, Kwiek and three of his co-defendants pleaded guilty and applied for probation. The case was continued for pre-sentence investigations. Because he pleaded guilty, the record does not show the exact extent of Kwiek's participation in the robbery. It does appear that for twelve years he had been an employee of the dairy which was robbed, and that while he was not present when the robbery occurred, he had described the premises to those who did participate, and told them where the money was kept.

When the applications for probation came on for hearing on September 17, 1958, Kwiek's counsel referred to the fact that he was not present during the robbery, and stated that his participation was minimal. As soon as he did so,

the prosecution asked that the plea of guilty be set aside and the case set for trial. The court then called the defendant before the bench and stated to him that he did not "want the slightest doubt in my mind that the defendant does not understand the nature of a plea of guilty or feels that he is being tried for something he didn't do. If that is the case he should plead not guilty and be tried. Do I understand correctly, by your plea of guilty you are admitting you participated in this robbery as charged in the indictment, is that right?" To which the defendant answered, "Yes, sir." Defendant's counsel also stated, "I wouldn't say he is innocent at all, Judge. If he were innocent, I would have him plead not guilty."

Defendant's application for probation was denied. During the discussion concerning the prosecution's recommendation as to sentence, when defendant's counsel again referred to the degree of his participation, the court stated that if counsel made another statement of that kind "I will withdraw the plea of guilty and let him plead not guilty." Defendant was then sentenced.

The claim that the trial court abused his discretion in denying the motions to vacate the judgment and sentence and to allow the defendant to withdraw his plea of guilty is based upon defendant's assertion that he pleaded guilty because his attorney assured him that he would be placed on probation. The claim is not supported, either by the transcript of the proceedings upon the application for probation or by the testimony heard upon the motion to vacate.

Defendant's counsel did indeed testify that he told the defendant to plead guilty because the assistant State's Attorney had told him that his client would get probation. But he also testified that he knew it was the policy of the State's Attorney's office not to recommend probation in cases of

armed robbery, that he knew before the hearing on the application for probation that the prosecution would recommend a penitentiary sentence, and that at a pre-trial conference the judge had stated that he would not commit himself as to probation. The assistant State's Attorney denied that he had ever agreed to recommend probation.

The defendant testified that his attorney told him that if he pleaded guilty he would receive probation and that his plea was based on that statement. In defendant's brief much is made of the fact that on the day he was sentenced he drove to the court house in his employer's truck, "expecting that in a few minutes he would be free to return to work." What is overlooked is that the defendant also testified that long after August 12, when he had pleaded guilty, he asked his attorney, "should it be for me to come down prepared for sentence or to get the probation." This testimony belies his claim that he pleaded guilty because he was assured of probation.

It is unnecessary to discuss legal principles or precedents. The defendant's claim that the trial judge abused his discretion assumes the truth of his own testimony and that of the attorney who then represented him. But the trial judge was not required to believe that testimony. He could have regarded it as at best improbable and at worst false. The record does not show that the judge abused his discretion. On the contrary, it shows that he was scrupulous to safeguard the defendant's rights. The judgment is affirmed.

Judgment affirmed.

APPENDIX II

(Extract from Additional Abstract filed in the Supreme Court of Illinois.)

* * * *

90 The Court: I asked him several times and furthermore in this case even after an examination there has been no showing that he even has a defense here.

Mr. Bellows: He says he is not guilty. There is no use of going into a defense here but he says he is not guilty of the crime, your Honor.

The Court: Counsel, I am familiar with the case of *People* v. *Morreale* and I have examined it very carefully and I still feel that under the circumstances and believe me, . . .

Mr. Bellows: Yes, but every once in a while there is this sort of a representation, maybe it is just casual, maybe just insinuation or innuendo, that a lawyer gets that idea. I probably wouldn't have gotten that idea, perhaps. Maybe I am of different caliber. I would want to know more of what he has to say when the State's Attorney says he is going to get something, but Mr. Schultze got that impression and he conveyed it.

Now, there is no question about it, your Honor that is what happened.

The Court: Well, the defendant's recourse here is against the attorney here.